TAX APPEAL No 539 of 2003
with
TAX APPEAL No 90 of 2004
with
SPECIAL CIVIL APPLICATION No 3605 of 2004
with
SPECIAL CIVIL APPLICATION No 3960 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NITIN P. SHAH ALIAS MODI

Versus

DY.C.I.T.

Appearance:

1. TAX APPEAL No. 539 of 2003 WITH SPECIAL CIVIL APPLICATION Nos. 3605 of 2004 and 3960 of 2004.
MR SN SOPARKAR, SENIOR ADVOCATE WITH MRS SWATI SOPARKAR for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

2. TAX APPEAL No. 90 of 2004
MR MANISH R BHATT for Petitioner No. 1
MR SN SOPARKAR, SENIOR ADVOCATE WITH MRS SWATI SOPARKAR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 16-18-23/12/2004

COMMON JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 In Special Civil Application No. 3605 of 2004 while issuing notice the court directed that the said petition shall be heard with Tax Appeal Nos. 539 of 2003 and 90 of 2004. Accordingly all these matters, which are interconnected, have been heard together and are taken up for final disposal with the consent of the learned Advocates for the respective parties.

TAX APPEAL No. 539 OF 2003.

2 The appellant is the assessee who has challenged the order of the Tribunal dated 10/7/2003 by proposing the following questions of law stated to arise out of ITA No.3910/AHD/2002 for assessment year 1997-98 :

"(i) Whether, in the facts and circumstances of the case the ITAT was right in law in holding that the amount of Rs.67.75 lacs placed as deposit with L.T.Shroff Group is unexplained investment of the appellant and the same is not covered by the disclosure made by the appellant under VDIS ?

(ii) Whether, in the facts and circumstances of the case the ITAT was right in law in holding that under VDIS 1997, along with the disclosure, the declarant has to show the basis on which yearwise figures of income was arrived at together with the manner in which the income was bifurcated on the basis of ultimate investments existing as on the cut off date ?

(iii) Whether, in the facts and circumstances of the case, the order of the ITAT was perverse in as much as the ITAT has failed to appreciate that the appellant was prevented from sufficient cause and could not have produced the passbook issued by

the L.T Shroff Group at any stage prior to the set aside first appellate proceedings ?

(iv) Whether, in the facts and circumstances of the case, the order of the ITAT was perverse in as much as it has not properly appreciated the evidences already placed on record and insisted on some hypothetical and hiper technical evidences to be placed on record ?

(v) Whether, in the facts and circumstances of the case the ITAT was right in law in holding that CIT(A) can make fresh addition on all together different ground and reasoning after deleting the additions made by the assessing officer?

(vi) Whether, in the facts and circumstances of the case the ITAT was right in law in holding that the enhancement of income made by CIT(A) is legal and within his jurisdiction in spite of the fact that the same has been on entirely different grounds which have not been even considered by the Respondent and which has resulted into assessing an altogether new source of income in the hands of the appellant ?

(vii) Whether, in the facts and circumstances of the case the order of ITAT was null, void and illegal as the order passed by the Respondent has been held to be illegal, without jurisdiction, null, void and non-est and therefore no addition can be sustained based on the said order or in any subsequent proceeding emanating from the same ?

(viii) Whether, in the facts and circumstances of the case the ITAT was right in law in not appreciating the alternate claim of the appellant that if the amount of Rs.67.75 lacs is not recovered from L.T.Shroff Group, the same may be allowed as trading loss ?"

3 Heard Mr.S.N.Soparkar, learned Senior Advocate appearing on behalf of the appellant and Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the respondent-revenue.

ADMIT.

The following substantial question of law arises for consideration :

> "Whether, on the facts and in the circumstances of the case the order of the Tribunal can be said to be perverse when the Tribunal has failed to appreciate that the appellant was prevented by sufficient cause from producing the passbook issued by L.T.Shroff Group at any stage prior to the appellate proceedings in the second round after assessment order was set aside in the first round ?"

4 The assessment year is 1997-98 and the relevant previous year is 31/3/1997. The assessee was assessed on total income of Rs.67.75 lacs by treating deposit of Rs.67.75 lacs with L.T.Shroff Group as being unexplained investment under Section 69 of the Income Tax Act,1961 (the Act) on 31/3/2000. The said order came to be challenged before CIT (Appeals) who for the reasons stated in his order dated 15/3/2001 set aside the assessment with a direction to the Assessing Officer to offer proper opportunity to the assessee.

5 While framing fresh assessment the Assessing Officer made an addition of Rs.137 lacs by holding that the said amount declared under the Voluntary Disclosure of Income Scheme, 1997 (VDIS) was not credited in the books and no intimation was given to the Assessing Officer. In so far as the amount of Rs.67.75 lacs was concerned the Assessing Officer held that the same cannot be adjudicated in the course of regular assessment proceedings and can only be a subject matter of proceedings under Chapter XIVB of the Act. This order was framed on 28/3/2002.

6 The assessee carried the matter in Appeal before CIT(Appeals) who vide his order dated 23/10/2002 deleted the addition of Rs.137 lacs. However, CIT(Appeals) issued a notice for enhancement in relation to the sum of Rs.67.75 lacs. The assessee submitted a written reply on 9/10/2002 and resisted the proposal for enhancement. The assessee also enclosed a certified photo copy of passbook issued by L.T.Shroff Group along with the said reply. The CIT (Appeals) however did not accept the explanation tendered by the assessee and enhanced income by a sum of Rs.67.75 lacs and also initiated penalty proceedings under Section 271(1)(c) of the Act. Both the assessee and the revenue filed appeals before the Tribunal. The assessee against

the addition of Rs.67.75 lacs and the revenue against deletion of the addition of Rs.137 lacs. The Tribunal dismissed both the appeals vide its order dated 10/3/2003.

7 Mr.S.N.Soparkar, Senior Advocate appearing on behalf of the appellant submitted that in so far as the addition of Rs.67.75 lacs was concerned the Tribunal had erred in doubting the authenticity and genuineness of the passbook produced by the assessee by stating that the same was produced at a belated stage before the CIT (Appeals) in the second round against set aside order, and that the assessee had failed to prove the authenticity and genuineness of the passbook. According to Mr.Soparkar the entire approach of the Tribunal was vitiated in law as the Tribunal failed to appreciate the circumstances in which the assessee was obliged to produce the said passbook before CIT(Appeals) in the second round. It was submitted that in the first round as the assessment had been framed within three days of issuance of show cause notice the assessee had not been accorded effective opportunity to meet with case of the revenue and hence the order of the CIT(Appeals) setting aside the said assessment. That in the second round, the Assessing Officer instead of dealing with merits of the addition of Rs.67.75 lacs came to the conclusion that the said amount was not required to be added in regular assessment proceedings but the provisions of Section 158BD were required to be invoked in relation to the said item. In fact the Assessing Officer made addition of Rs.137 lacs, an item which was not the subject matter of the original proceedings. In the circumstances, the assessee was obliged to produce the said passbook before CIT(Appeals) and that too only after CIT(Appeals) issued notice for enhancement. Thus, according to Mr.Soparkar the order of the Tribunal confirming the addition of Rs.67.75 lacs which was made by CIT (Appeals) for the first time in the second round was bad in law and to that extent the order of the Tribunal was required to be quashed and set aside.

8 Mr.M.R.Bhatt, learned Advocate submitted that the assessee had failed to produce the relevant piece of evidence in the first round before the Assessing Authority; not only that the same was not even produced before CIT(Appeals) in the first round. That it was open to the assessee to place the said evidence on record in the set aside proceedings regardless of the opinion expressed by the Assessing Officer, especially when CIT(Appeals) had directed the Assessing Officer to frame the assessment after giving opportunity to the assessee.

8.1 It was alternatively contended that both

Commissioner (Appeals) and Tribunal had looked into other evidence and came to the conclusion that assessee was not able to substantiate its stand that the sum of Rs.67.75 lacs formed part of the disclosed amount of Rs.137 lacs for the said assessment year. That the onus which was on the assessee had not been discharged and that was a concurrent finding recorded by the CIT (Appeals) and the Tribunal. In the circumstances, according to Mr.Bhatt there was no error committed by the Tribunal in confirming the addition of Rs.67.75 lacs.

9 The assessment was originally framed on 31/3/2000 under Section 143(3) of the Act. The assessee had not furnished any return of income within time limit specified under Section 139(1) for assessment year 1997-98 and upon being issued notice under Section 142(1) of the Act on 17/1/2000, the assessee replied vide letter dated 16/2/2000 that it had disclosed income to the tune of Rs.817 lacs and a sum of Rs.137 lacs was offered as income for the year under consideration. That therefore as no further income was there to be offered for the assessment year in question it was not necessary to file any return of income. Hence a request was made to the Assessing Officer to drop the proceedings.

10 It appears that a search operation under Section 132 of the Act was conducted at the premises of L.T.Shroff Group on 1/8/1996. The said group appeared to be engaged in the business of financing and acting as a private bank. According to the Assessing Officer from certain loose papers recovered from the said group name of one Shri Nitin P.Modi appeared and as per the said papers there was a credit balance of Rs.67.75 lacs. The assessee was called upon to submit reply vide show cause letter dated 28/3/2000. The assessee objected to the proposed course of action vide reply dated 30/3/2000 and submitted that : (a) assessee was not provided with statement of persons that were proposed to be used against assessee; (b) no inquiries were conducted in the case of the assessee when the search proceedings were carried out in the case of L.T.Shroff Group; (c) the assessee was not identified on the basis of the seized material by carrying out necessary investigation under Section 131 of the Act; (d) the burden was on the revenue to establish the alleged transaction and its consequence to result in taxable income. A further letter dated 31/3/2000 was filed and it was submitted that assessee had already made declaration under VDIS and there was no further income which was liable to tax for the year under consideration. The Assessing Officer rejected the submissions made and framed the assessment on 31/3/2000 adding entire sum of Rs.67.75 lacs as unexplained

investment under Section 69 of the Act.

11 The assessee carried the matter in appeal before CIT(Appeals) and one of the basic contentions along with other grounds was that the assessee was not accorded full and proper opportunity to meet with the case of the Assessing Officer. The CIT (Appeals) observed as under :

"5.1. The totality of the facts indicates that the assessment suffers from following infirmities:

(1) The notice under sec.142(1) enclosing therewith a show cause notice wherein the basis of proceedings initiated against the assessee was given was issued as late as on 28/3/2000, when the proceedings were getting time barred on 31/3/2000. The assessee was confronted for the first time with the information that papers seized in L.T.Shroff group showed a credit balance of Rs.67.75 lakhs in the name of the assessee. Thus, sufficient opportunity was not allowed to furnish an explanation or to rebut the show cause notice.

(2) The Assessing Officer did not make the seized material or the statements recorded u/s.132(4) available to the assessee inspite of request made vide reply dated 30.3.2000. The principles of natural justice requires that any material collected behind the back of an assessee and to be used against him in assessment is required to be made available to him so as to give him an opportunity to rebut the same.

6 From the above, it is clear that the Assessing Officer has not given adequate and proper opportunity to the assessee before including the amount of Rs.67.75 lakhs for assessment in his hands for A.Y.1997-98. Also it cannot be conclusively held that the declaration made by the appellant under VDIS,1997 included the aforesaid amount of Rs.67.75 lakhs as before the Assessing Officer, he neither accepted nor clearly denied the existence of the said credit balance in his name which came to be revealed from the search

> in L.T.Shroff group. The assessment is therefore, required to be made afresh after subjecting the appellant with the material gathered against him and after allowing him a proper opportunity to offer his explanation. For this purpose, the assessment is being set aside to be made denovo as per facts and law."

12 Upon assessment having been set aside fresh assessment was framed on 28/3/2002 wherein no addition in relation to the said item of Rs.67.75 lacs was made and the Assessing Officer merely stated that the said sum can only be assessed under Section 158BD of the Act. As already noticed hereinbefore the addition of Rs.137 lacs in the fresh assessment was carried in appeal and ultimately both the sides went before the Tribunal.

13 In light of the aforesaid findings recorded by CIT (Appeals), it is apparent that the Tribunal erred in adopting the course that it did. Despite the aforesaid facts being available on record the Tribunal states that the assessee has also not given any convincing reason as to why this passbook issued by L.T.Shroff Group was not produced during the original assessment proceedings. The Tribunal records that the assessee stated that he was allowed only three days time. Once this fact was available before the Tribunal and the record proves that, the Tribunal ought not to have brushed aside the explanation of the assessee and proceeded to deal with the addition on merits on other grounds. The law as to principles of natural justice is well settled and needs no reiteration. Even for the purpose of tax proceedings the said principles would come into play and all that the assessee was seeking was a reasonable opportunity. The Tribunal lost sight of the fact that the assessee had no occasion to produce the said passbook in the first round before the Assessing Authority due to short period of notice viz. three days within which the assessment was framed as it was getting barred by limitation. In the second round, the Assessing Officer specifically stated that he did not want to make addition qua the said item of Rs.67.75 lacs and hence the assessee had no occasion to produce the said piece of evidence. That left the assessee with no choice but to produce the said passbook for the first time before CIT(Appeals) in the proceedings of second round, and that too only when the assessee was served with notice for enhancement.

14 In light of the aforesaid fact situation it is apparent that the order of the Tribunal to the extent it

confirms the addition of Rs.67.75 lacs cannot be permitted to stand and the same is quashed and set aside. The Tribunal is directed to hear both the parties after giving proper opportunity in relation to the said addition of Rs.67.75 lacs. It will be open to the Tribunal, if it deems fit, to restore the matter to the CIT (Appeals) or the Assessing Authority so as to provide adequate opportunity both to the assessee and the revenue to place on record whatever evidence either side may choose to bring on record.

15 The question is therefore answered in light of what is stated hereinbefore : that the appellant was prevented by sufficient cause from producing the passbook issued by L.T.Shroff Group at any stage prior to the appellate proceedings in the second round after assessment order was set aside in the first round and the Tribunal was in error in holding otherwise.

The appeal is accordingly allowed.

TAX APPEAL No.90 OF 2004.

16 The appellant revenue challenges the order of the Tribunal dated 10/7/2003 made in appeal filed by the revenue being ITA 99/Ahd/03 by proposing the following two questions :

"(a) Whether the Appellate Tribunal was right in law and on facts in up-holding the directions of the CIT(A), that the Assessing Officer while completing fresh assessment pursuant to the directions given by the CIT(A) vide her order dated 15/03/2001 had no right to assess the income of Rs.137 lacs in the fresh assessment order, when the earlier Asstt. order was set aside to be made 'de novo'?

(b) Whether the Appellate Tribunal was right in law and on facts in up-holding the directions of the CIT(A) that the provisions of section 158BD of the Income Tax Act were not applicable in this case with regard to bringing to tax the amount of Rs.67.75 lacs ?"

17 Having heard learned Advocates for the parties the appeal is admitted on the following substantial questions of law :

"(i) Whether the Appellate Tribunal was right in law and on facts in up-holding the directions of the CIT(A), that the Assessing Officer while completing fresh assessment pursuant to the directions given by the CIT(A) vide her order dated 15/03/2001 had no right to assess the income of Rs.137 lacs in the fresh assessment order, when the earlier Asstt. order was set aside to be made 'de novo'?

(ii) Whether, in the facts and circumstances of the case the Appellate Tribunal was right in law in holding that the income of Rs.137 lakhs declared by the assessee in the Declaration under VDIS-97 pertaining to AY 1997-98 cannot once again be held to be liable to tax in fresh assessment for the redetermination of issue relating to the assessability of income of Rs.67.75 lacs?

(iii) Whether the Appellate Tribunal was right in law and on facts in up-holding the directions of the CIT(A) that the provisions of section 158BD of the Income Tax Act were not applicable in this case with regard to bringing to tax the amount of Rs.67.75 lacs ?"

18 Mr.M.R.Bhatt, learned Advocate appearing on behalf of the appellant -revenue submitted that the Tribunal was in error in confirming the finding of the CIT(Appeal) that the income of Rs.137 lacs declared by the assessee under VDIS pertaining to A.Y.1997-98 could not be taxed once again in fresh assessment despite the fact that in the first round CIT (Appeals) had set aside the assessment order with a direction to make 'denovo' assessment. According to Mr.Bhatt the CIT(Appeals) having set aside the assessment "to be made denovo as per facts and law" the Assessing Officer was within his right to bring to tax any other item, which according to the Assessing Officer, was taxable for the year under consideration. That both the CIT(Appeals) and the Tribunal had erred in holding that the order of CIT(Appeals) in the first round made on 15/3/2001 was for a limited purpose i.e. as to whether the amount of Rs.67.75 lacs was included in the disclosure made by the assessee under VDIS.

19 Mr.Soparkar responding to the aforesaid submission

contended that there was no infirmity in the orders of CIT(Appeals) and the Tribunal. That in a set aside assessment like the present one, where the assessment was set aside for the limited purpose of granting opportunity to the assessee in relation to the addition made i.e. Rs.67.75 lacs, it was not open to the Assessing Officer to process a new source. That both the Appellate Authorities had correctly read the order of CIT (Appeals) made in the first round to mean as having been made for a limited purpose and merely because the CIT (Appeals) had set aside the assessment order for the purpose of making denovo assessment, the Assessing Officer could not be permitted to derive jurisdiction in relation to an item which was not the subject matter of assessment in the first round.

20 As can be seen from the facts which have come on record when the original assessment was framed under Section 143(3) of the Act on 31/3/2000 the question relating to assessability of Rs.137 lacs as income in the course of regular assessment was not the subject matter of consideration. The CIT (Appeals), therefore, while setting aside the said assessment order could not have issued any direction to process the said item in the set aside proceedings and hence the order of set aside has to be read as being confined to the item which was added by the Assessing Officer and which was under challenge before CIT (Appeals). The only way CIT (Appeals) could have issued such a direction was by issuance of notice for enhancement which admittedly has not been done in the first round. In the circumstances, once the assessability of Rs.137 lacs was not the subject matter of consideration in the original assessment made on 31/3/2000 it could not have entered the zone of consideration by CIT (Appeals) and CIT (Appeals) has thus admittedly not given any direction in his order dated 15/3/2001. The Appellate Authorities have also noted the fact that under the Act there are various provisions under which a new source of income in appropriate cases may be taken up for consideration by way of revision, rectification or reassessment. In light of what is stated hereinbefore there is no infirmity in the order of the Tribunal in upholding the direction of the CIT (Appeals) that in the set aside proceedings the Assessing Officer had no right to assess the income of Rs.137 lacs in the fresh assessment order.

18/12/2004.

21 There is one more aspect of the matter. The original assessment was framed under Section 144 of the Act on 31/3/2000 on a total income of Rs.67.75 lacs which came

to be set aside by CIT (Appeals). Pursuant to the set aside, while framing fresh assessment the Assessing Officer came to the conclusion that as per provisions of Section 68(1) of the Finance Act,1997 the assessee was not entitled to immunity under VDIS in relation to the sum of Rs.137 lacs, declared to be undisclosed income under VDIS for assessment year 1997-98. According to the Assessing Officer the benefit of VDIS was not admissible to the assessee as the assessee had failed to comply with the mandatory requirement of Section 68(1) of the Finance Act,1997 by which VDIS was floated. The Assessing Officer stated that records of the assessee for different years were perused and the assessee had neither credited the amount declared under VDIS for the year under consideration in the books nor had the assessee given any intimation of such credit to the Assessing Officer.

22 Responding to the contention of the assessee regarding secrecy of the declaration under VDIS and the assurance given under VDIS, the Assessing Officer observed that the nature and source of declaration were not being asked. That confidentiality of the declaration was also not being disturbed or broken. The Assessing Officer was merely examining as to whether the assessee had, in relation to the disclosed amount of Rs.137 lacs for the year under consideration complied with the requirement of VDIS. The Assessing Officer further recorded that even provisions of Section 64(1)(a) of the Scheme were not satisfied. Reliance by the assessee on various CBDT circulars for the purpose of showing compliance with Section 64(1)(a) of the Act, was met with by the Assessing Officer by stating that the only power that was available with the Central Government was under Section 76 of VDIS to remove difficulties in giving effect to the provisions of the Scheme, but under the said provisions it was not open to either the Central Government or Central Board of Direct Taxes to issue circulars so as to give fresh legal right by way of clarification or instruction which in fact was within the field of legislation. The Assessing Officer further invoked Article 14 of the Constitution of India to state that Board by issuing such circulars was violating the said article. Thus, he made addition of Rs.137 lacs to the total income on 28/3/2002 while framing fresh assessment.

23 As noted hereinbefore the assessee succeeded before CIT (Appeals) and the revenue's appeal on this count was dismissed by the Tribunal.

24 Section 68 of the VDIS reads as under :

"Voluntarily disclosed income not to be included in the total income.

68.(1) The amount of the voluntarily disclosed income shall not be included in the total income of the declarant for any assessment year under the Income-tax Act, if the following conditions are fulfilled, namely :-

i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the Assessing Officer; and

ii) the income-tax in respect of the voluntarily disclosed income is paid by the declarant within the time specified in section 66 or section 67.

(2) The Commissioner shall, on an application made by the declarant, grant a certificate to him setting forth the particulars of the voluntarily disclosed income and the amount of income-tax paid in respect of the same".

The said provision on a plain reading makes it clear that the amount of voluntarily disclosed income shall not be included in the total income of the declarant for any assessment year under the Act if the specified conditions stand fulfilled. The conditions are:- (i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the Assessing Officer; and (ii) the income-tax in respect of such voluntarily disclosed income is paid by the declarant within the time specified in section 66 or section 67. Under sub-section (2) it is provided that on an application made by the declarant, the Commissioner shall grant certificate to the declarant and such certificate shall set out the particulars of the voluntarily disclosed income and the amount of income-tax paid in respect of such disclosure. Emphasis of the Assessing Officer on non compliance with condition as prescribed in section 68(1)(i) is required to be considered.

25 It is an accepted fact that the disclosure made by the assessee has been accepted by the Commissioner. The necessary certificate under section 68(2) of the VDIS has been issued on 22/4/1998. The certificate carries the details of declaration wherein out of total declaration of Rs.817 lacs pertaining to various years commencing from

1991-92 to 1997-98, a sum of Rs.137 lacs has been shown to have been declared for assessment year 1997-98. The certificate also gives the descriptions of assets and the breakup showing the respective amounts against each asset so declared. The certificate also records that the tax of Rs.2,45,10,000/- has been paid as worked out on the income declared. Going to Form which is prescribed under Rule 3, it is apparent that even the Form requires under item No.5, to give statement of voluntarily disclosed income and the same details tally with the details recorded in the certificate. However, what is necessary, and more pertinent for the present, is item No.10 which reads "whether the amount of voluntarily disclosed income has been credited in the Books of Account or any other record (if so attach copies of the relevant entries in duplicate)". Against the said item the Form gives two squares, with 'Yes' and 'No' succeeding the squares, and the square bearing 'Yes' has been tick marked. Thus, evidence on record goes to show that the assessee had while making declaration filled up the prescribed Form including entry regarding credit in the Books of Account or other record. The declaration is accompanied by notes attached to and forming part of the declaration under sub-section (1) of section 65(1) of VDIS. Note No.4 specifically states as under :

"4. Necessary taxes @30% on the aggregate income disclosed has been paid and challan evidencing the payment of the same is attached herewith. Journal entries with reference to the said disclosure are passed as follows :

JOURNAL ENTRIES :

PARTICULARS	DEBIT AMT(RS)	CREDIT AMT(RS)
1) Cash A/c. Dr.	31,000	
Stock A/c. Dr.	25,00,000	
Receivables A/c.(net of Liabilities) Dr.	7,91,69,000	
To Income offered to tax under the VDIS'97 account		8,17,00,000

(Being the entries

passed to reflect the
various assets referable
to the disclosure).

Income offered under

VDIS, 1997 Dr.8,17,00,000

To Capital Account 8,17,00,000

(Being entries passed
to credit the capital
A/c. with the income
offered under VDIS,1997) "

Thus, it cannot be stated that there was no compliance with provision of Section 68(1)(i) of the Scheme.

26 As can be seen from the Form of Declaration the declarant is required to attach copies of relevant entries made in the Books of Account or any other record along with declaration in duplicate. The purpose behind the scheme providing for making of entries in the Books of Account or any other record is to ensure that the same declared income (asset) is not relied upon to explain away some other income (asset) by an assessee in subsequent proceedings. There is one more reason. Under section 73 of VDIS, a declarant is not required to pay wealth tax where the voluntarily disclosed income is represented by cash, bullion, other assets specified in section 73(1) of the scheme but such immunity from payment of Wealth Tax is for the assessment years for which declaration is made. Meaning thereby the declarant is required to show that corresponding wealth, relatable to such income/asset declared under VDIS, is returned for the subsequent assessment years. Thus making of credit on the basis in the Books of Account or in other record assumes importance for the purpose of wealth tax payable for subsequent assessment years also. The requirement of furnishing the copies of the entries in duplicate along with declaration form indicates that one set is retained by Commissioner along with declaration made by the concerned assessee while second set is forwarded to the Assessing Officer having jurisdiction over the declarant.

27 The Commissioner having issued certificate under section 68(2) of the Scheme judicial discipline requires that the authorities entrusted with administering law proceed on the basis that the certificate granted by the Commissioner would indicate satisfaction of all the

requisite conditions as required by the provisions of the scheme and it is not open to subordinate authority to sit in judgment over the certificate granted by the Commissioner. The Assessing Officer in the present case has, while making addition of Rs.137 lacs in the fresh assessment made pursuant to order of set aside, taken upon himself to give go bye to the certificate issued by the Commissioner as if the said certificate had been issued by the Commissioner without verification or application of mind. The Court is not prepared to proceed on such an assumption, though it was so contended by the learned Counsel for the revenue. The fact that the Commissioner is superior authority in so far as the Assessing Officer is concerned is not in dispute and could not be disputed by the learned Counsel for the revenue. Once that is the position the following observations made by the Apex Court in case of Gestenter Duplicators P. Ltd. V. Commissioner of Income-Tax,(1979) 117 ITR 1 would apply. In a case where a private company employed salesmen with a fixed monthly salary and also commission at fixed percentage of the turnover achieved by the salesmen, the assessee company paid employer's contribution to a Provident fund maintained by the company after computing the same by considering both as salary. The Fund was recognised by the Commissioner. According to the Assessing Officer the commission so paid did not partake the character of salary and, hence, the contribution made in relation to such commission was proportionately disallowed in the assessment proceedings. After deciding on the merits of the dispute between the parties and taking into consideration the terms of the contract it was observed by the Court that :

"It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for any particular assessment year implies that the provident fund satisfies all the conditions under r.4 of Part A of the Fourth Schedule to the Act and not sit in judgment over it. There is ample power conferred upon the Commissioner under r.3 of Part A of the Fourth Schedule to withdraw at any time the recognition already granted if, in his opinion, the provident fund contravenes any of the conditions required to be satisfied for its recognition and if during the assessment proceedings for any particular assessment year the taxing authority finds that the provident fund maintained by an assessee has contravened any of the conditions of recognition,

> he may refer the question of withdrawal of recognition to the Commissioner but until the Commissioner acting under the powers reserved to him withdraws such recognition the taxing authority must proceed on the basis that the provident fund has satisfied all the requisite conditions for its recognition for that year; any other course is bound to result in chaos and uncertainty which has to be avoided".

Therefore, it is not open to the Assessing Officer to go behind the certificate issued by the Commissioner and by ignoring same assess an income which has already borne tax under VDIS.

28 The Assessing Officer has assigned one more reason for rejecting the declaration made under VDIS by the assessee. According to the Assessing Officer the circulars issued by the Central Board of Direct Taxes could not have been issued under section 119 of the Act, and hence, they are violative of the provisions of the Constitution as well as go beyond the powers available to the Board under the Act. A similar contention was specifically raised in a case before the Supreme Court in case of Union of India and Another Vs. Azadi Bachao Andolan and Another (2003) 263 ITR 706. The Supreme Court observed :

> "It is trite law that as long as an authority has power, which is traceable to a source, the mere fact that source of power is not indicated in an instrument does not render the instrument invalid (see in this connection State of Sikkim v.Dorjee Tshering Bhutia [1991] 4 SCC 243 at para 16; N.B.Sanjana, Assistant Collector of Central Excise v.Elphinstone Spinning and Weaving Mills Co.Ltd. [1971] 1 SCC 337; B.Balakotaiah v. Union of India [1968] SCR 1052; AIR 1958 SC 232 and Afzal Ullah v. State of U.P.[1964] 4 SCR 991; AIR 1964 SC 264)."

Even on this ground the Assessing Officer was not justified in holding that the sum of Rs.137 lacs did not form part of valid declaration.

29 Though in the present case it was submitted on behalf of the revenue that relevant entries were not found on record as observed by the Assessing Officer it is necessary to note that the declaration was made on 31/12/1997 and hence the said entries would come on record only at subsequent stage. This fact is borne out by

further affidavit filed by the assessee in cognate matter being SCA No.3960/04 wherein it is categorically affirmed that while filing return of income for assessment year 1998-99, the first return filed after making declaration under VDIS, a note by way of Note No.2 to the return of income clearly states that all entries regarding declaration have been incorporated in the Books of Account.

30 Therefore, neither in law was it permissible to the Assessing Officer to make addition of Rs.137 lacs in the said assessment, especially when the said item was not processed originally and in appellate proceedings only item of Rs.67.75 lacs had been set aside, and in light of the certificate issued by the Commissioner, which till date rules the field, having not been withdrawn by a competent authority; nor is it possible to uphold the action of the Assessing Officer on facts in light of what is stated hereinbefore. Thus, question Nos. 1 and 2 are answered accordingly.

31 In so far as third question is concerned it is necessary to note certain facts. After the assessment was set aside by the CIT (Appeals) on 15/3/2001 the Assessing Officer came to the conclusion that when the search took place at the premises of L.T.Shroff Group on 1/8/1996 a Special Chapter XIVB of the Act had already been brought on the statute book by the Finance Act,1995 with effect from 1/7/1995, providing for special procedure for assessment in cases of search. According to the Assessing Officer Section 158BD of the said Chapter would be applicable to the case of the assessee and hence sum of Rs.67.75 lacs could only be assessed in the block assessment proceedings and not in the regular assessment proceedings. The Assessing Officer therefore issued a show cause notice by recording so in the order sheet on 11/3/2002. The assessee responded by reply dated 15/3/2002 wherein he objected to the applicability of provisions under Chapter XIVB of the Act. The Assessing Officer rejected the objection of the assessee by stating that while making assessment on remand, the Assessing Officer has all the powers which he originally had while framing original assessment order and all issues of fact and law could be considered denovo. It was further stated by the Assessing Officer that the issue regarding applicability of Section 158BD of the Act was not before CIT(Appeals) and hence CIT(Appeals) could not have expressed anything on the issue which was not the subject matter before him. Therefore, the Assessing Officer held that "the sum of Rs.67.75 lacs, can only be assessed under Section 158BD".

32 The assessee carried the matter in appeal before

CIT(Appeals) and the CIT(Appeals) came to the conclusion that Section 158BD requires satisfaction of the Assessing Officer of person searched before initiation of proceedings under Section 158BD of the Act. The CIT (Appeals) further held that "perusal of case records does not show any such satisfaction of the Assessing Officer of L.T.Shroff Group". According to CIT(Appeals) the factum of search was known when the original assessment was framed and despite that seizure was only in relation to the Books of Accounts and documents in case of L.T.Shroff Group and there was no seizure effected in case of the assessee. The CIT (Appeals) therefore held that the finding of the Assessing Officer that Section 158BD of the Act was applicable was not as per law.

33 The revenue carried the matter in appeal before the Tribunal. The Tribunal for the reasons stated in its order held that the CIT(Appeals) was justified in holding that in absence of any satisfaction recorded by the Assessing Officer assessing case of L.T.Shroff Group, and the direction of CIT(Appeals) in the first appellate order, the provisions of Section 158BD of the Act are not applicable in case of the assessee and the issue was beyond the scope of the assessment made in set aside proceedings.

34 Mr.M.R.Bhatt, learned Senior Standing Counsel assailing the orders of the Tribunal and CIT (Appeals) submitted that the Assessing Officer had merely made observations regarding applicability of Section 158BD of the Act and that in fact the said proceedings had been initiated by issuance of a separate notice, which was the subject matter of challenge in SCA No.3605/2004. That such observation could not be challenged by way of appeal and hence neither CIT (Appeals) nor Tribunal were called upon to render any opinion or decision on merits regarding applicability of Section 158BD of the Act.

34.1 Alternatively it was submitted that the jurisdictional facts were available under the provisions of Section 158B(b) read with Section 158BA of the Act and hence, even if there was some procedural irregularity while invoking Section 158BD the same could not be a ground for quashing the said proceedings. It was submitted that the satisfaction envisaged under Section 158BD of the Act may not have been intimated by the Assessing Officer of the person searched, but if the material on record suggested that Assessing Officer having jurisdiction over other person (in the present case assessee) had information as to facts it was always open to the Assessing Officer to proceed in accordance with provisions of Chapter XIVB against such other person. In support of the aforesaid

proposition Mr.Bhatt placed reliance on the following decisions of this Court :

Rushil Industries Ltd. Vs. Harsh Prakash
(2001) 251 ITR 608

Priya Blue Industries P.Ltd. Vs. Joint Commissioner of Income Tax (2001) 251 ITR 615

Premjibhai And Sons Vs. Joint Commissioner of Income Tax (2001) 251 ITR 625

35 Mr.S.N.Soparkar, learned Advocate appearing on behalf of the respondent submitted that the Assessing Officer in the second round had exceeded jurisdiction vested in him and the CIT (Appeals) and the Tribunal were justified in holding that provisions of Section 158BD of the Act could not have been resorted to by the Assessing Officer in regular assessment proceedings in relation to the sum of Rs.67.75 lacs which was added in regular assessment completed on 31/3/2000. He has therefore submitted that the Assessing Officer could not have even observed as submitted by the learned Standing Counsel, if for the sake of argument it was accepted that the said findings were mere observations. In fact the Assessing Officer had recorded categorical findings and they could not be termed as observations as suggested by the learned Counsel for the revenue.

36 Section 158BD reads as under :

> "Undisclosed income of any other person.
> 158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed [under section 158BC] against such other person and the provisions of this Chapter shall apply accordingly".

On a plain reading, before the Section comes into play, the following conditions are required to be satisfied :

[i] The Assessing Officer who is assessing the person searched has to be satisfied that any undisclosed income belongs to a person other than person searched;

[ii] Secondly, the Books of Accounts, other documents or assets seized shall be handed over to the Assessing Officer having jurisdiction over such other person.

Thus, the satisfaction has to be of the Assessing Officer having jurisdiction over the person searched, who in the present case would be the Assessing Officer having jurisdiction over the L.T.Shroff Group. The said Assessing Officer having jurisdiction over the person searched is thereafter required to hand over the Books of Accounts, other documents or seized assets to the Assessing Officer having jurisdiction over the other person. In other words the Assessing Officer of L.T.Shroff Group is required to record a satisfaction that an undisclosed income, which comes to light on examination of Books of Accounts or other documents or the seized assets, belongs to the assessee, and after recording such satisfaction hands over such Books of Accounts etc. as may be relevant to the Assessing Officer having jurisdiction over the assessee. The CIT (Appeals) has categorically found, as noticed hereinbefore, that on perusal of the record no such intimation/information has travelled from the Assessing Officer of the L.T.Shroff Group to the Assessing Officer of the assessee.

37 Reliance on provision of Section 158B(b) which defines 'undisclosed income" by the revenue is misplaced. The said definition merely defines what undisclosed income would include. It is not a jurisdictional fact as contended on behalf of the revenue. Even if it was a jurisdictional fact, for the application of Section 158BD of the Act the same has to come by way of information or handing over of books of accounts, etc., by the Assessing Officer of the person searched.

38 Similarly provision of Section 158BA merely lays down that where a search is initiated under Section 132 of the Act after 30/6/1995 or Books of Accounts, other documents etc., are requisitioned under Section 132A of the Act then the Assessing Officer shall proceed to assess the undisclosed income in accordance with Chapter XIVB of the Act. In the present case, at the cost of repetition, it requires to be stated that no search was initiated in case of the assessee nor have any Books of Accounts or other documents been requisitioned under Section 132A of the Act and hence, there is no question of invoking Section 158BA

of the Act.

39 In the circumstances, on a plain reading of the relevant provisions it is not possible to accept the stand of the revenue that provisions of Section 158BD were rightly invoked or sought to be invoked by the Assessing Officer while framing fresh assessment after the original assessment was set aside by CIT (Appeals).

40 There is one more aspect of the matter. The sum of Rs.67.75 lacs was admittedly added as undisclosed income under Section 69 of the Act by the Assessing Officer vide assessment order dated 31/3/2000. The said order was carried in appeal and the CIT(Appeals) set aside the said order for the limited purpose of according opportunity to the assessee in relation to the said item of addition. Therefore also, in the second round of assessment proceedings the Assessing Officer could not have referred to provisions of Section 158BD of the Act in absence of the statutory conditions being fulfilled.

41 Therefore, the third question is answered accordingly i.e. the Appellate Tribunal was right in law in upholding the findings of CIT (Appeals) that provisions of Section 158BD of the Act were not applicable in this case for bringing to tax the amount of Rs.67.75 lacs.

The appeal is accordingly dismissed.

23/12/2004.

SPECIAL CIVIL APPLICATION No. 3605 OF 2004.

42 This petition challenges the notice issued under Section 158BD of the Act dated 28/3/2002 (Annexure-A) as being bad, illegal, contrary to law and without jurisdiction.

43 The facts as are necessary for determination of this petition have already been stated hereinbefore in relation to two tax appeals : one filed by the assessee and another filed by the revenue. The sum of Rs.67.75 lacs which was originally added under Section 69 of the Act in the hands of the petitioner for assessment year 1997-98 was not taken up for consideration in the second round by the Assessing Officer, after the assessment was set aside, on the ground that the said sum was required to be processed under Section 158BD of the Act.

44 As can be seen from the impugned notice (Annexure-A), the said notice is blank so far as the column

"block period ending on" is concerned. In other words, notice under Section 158BD of the Act calls upon the petitioner to file the return in the prescribed form within fifteen days of the service of notice without specifying the block period which is required to be mentioned as per provisions of Section 158BA of the Act. The assessee therefore approached the respondent vide communication dated 18/4/2002 (Annexure-F) stating that the petitioner was not in a position to file the return as required in view of the fact that the said notice was vague and unclear. However, instead of responding, on 5/9/2002 the respondent wrote to the petitioner stating that the petitioner having not filed the return of undisclosed income within twenty days in response to the notice under Section 158BD of the Act, which was duly served on 3/4/2002, the petitioner was liable to be proceeded against under Section 276CCC of the Act and to be prosecuted for non filing of the return of undisclosed income.

45 The petitioner once again wrote to the respondent on 16/9/2002 inviting reference to the earlier letter of 18/4/2002 seeking the same clarification. On 11/9/2003 the respondent wrote to the petitioner informing him that the return was to be filed for the block period from 1/8/1986 to 1/8/1996. On 24/11/2003 the petitioner made detailed submissions before the respondent stating that the observations/findings made by the Assessing Officer in the course of fresh assessment after set aside of the original assessment by the CIT (Appeals), had not been confirmed by CIT (Appeals). That the order of CIT(Appeals) in the second round was confirmed by the Tribunal. The petitioner therefore, requested to drop the proceedings initiated by issuance of the impugned notice under Section 158BD of the Act. However, the respondent issued notice under Section 142(1) of the Act dated 16/3/2004 in connection with the assessment of the block period and asked the petitioner to submit details of undisclosed income of Rs. 67.75 lacs which came to be noticed as a result of search in case of Shri L.T.Shroff Group as discussed in the body of the assessment order for assessment year 1997-98. It is, at this stage that the petitioner has approached this Court.

46 In light of the fact that by the judgment rendered in Tax Appeal No.90 of 2004 the Court has confirmed the orders of CIT(Appeals) and the Tribunal regarding non applicability of provisions of Section 158BD while framing fresh assessment after the original assessment was set aside by CIT (Appeals), it is not necessary to discuss the contentions of the parties in detail.

47 Apart from the fact that the pre-requisite

conditions for invoking Section 158BD of the Act remain unfulfilled it is also necessary to take note of the fact that the Tribunal is the final fact finding authority. Even if it was possible for the revenue to urge that the impugned notice issued on 28/3/2002 was validly issued, in light of the subsequent orders of the CIT(Appeals) and the Tribunal holding that the provisions of Section 158BD could not be invoked, it was not open to the revenue to thereafter place reliance on observations made in the fresh assessment order. As can be seen from the affidavit-in-reply filed by the respondent reliance has been placed on the fresh assessment made by the Assessing Officer under Section 144 read with Section 251 of the Act on 28/3/2002 and after referring to the same it is stated thus in the affidavit-in-reply:

> "The A.O. held in the fresh assessment order that the sum of Rs.67.75 lacs can be assessed u/s.158BD and not in the course of regular assessment proceedings, as it is on the basis of seized material in the case of L.T.Shroff".

Further in the reply affidavit the respondent states that the assessment order may be referred to in which the Assessing Officer has "made detailed discussions as to why this amount of Rs.67.75 lacs should be assessed under Section 158BD and not in the regular return." Thereafter the respondent quotes paragraph Nos. 3, 5.1 and 5.2 of the assessment order dated 28/3/2002.

48 The position in law is well settled that once a particular order is carried in appeal on the point on which the appellant is aggrieved, the order of the original authority merges with the order of the appellate authority and such appellate order is final order, which only can be looked into. For all intents and purposes, the order made by the original authority thereafter has no independent existence. Therefore, the insistence on part of the respondent to sustain the illegal notice under Section 158BD of the Act by placing reliance on various observations made by the Assessing Officer in the assessment order dated 28/3/2002 is wholly untenable and bad in law.

49 The fact may be noted that the Assessing Officer having jurisdiction over the petitioner had received the following information from the office of the Assistant Director of Income Tax (Investigation), Unit-1 (1), Ahmedabad by letter No.ADIT(Inv.)-1(1)/LTSG/96-97 dated 18/11/1996 :

"The L.T.Shroff group is engaged in the business of cash sarafi transactions and acting as private banker and used to issue passbooks similar to the passbooks issued by the banks to their clients to record cash transactions. It has been admitted by the assessees of this group and their employees that the cash transactions have not been recorded in the regular books of accounts and have not been disclosed to the I.T.Department in any manner.

Name of Shri Nitin P.Modi who is assessed with you is appearing at Sr.No.36 in the loose paper 5 & 6 seized from Manekchowk. He has been identified by Shri Kalpesh L.Thakkar and his employees. He is having a credit balance of Rs.67.75 lacs. In light of these facts, you are requested to take action at your end".

50 It is therefore clear that as the source of information was the office of the Assistant Director of Investigation and not the Assessing Officer having jurisdiction over the person searched viz. L.T.Shroff Group, the pre-requisite condition under Section 158BD which requires recording of satisfaction by the Assessing Officer having jurisdiction over the person in whose case the search was made is totally absent and the impugned notice could not have been issued due to lack of jurisdiction.

51. Therefore, in light of the foregoing discussion as well as the judgment rendered in Tax Appeal No.90 of 2004 the respondent could not have assumed jurisdiction so as to issue impugned notice under Section 158BD of the Act dated 28/3/2002. Accordingly the said notice is hereby quashed and set aside. Rule made absolute.

SPECIAL CIVIL APPLICATION No.3960 OF 2004.

52. The petitioner has, by way of this petition challenged notice issued under Section 148 of the Income Tax Act,1961 (the Act) dated 28/3/2003 (Annexure-A) issued by the respondent seeking to reopen the assessment for Assessment Year 1996-97, on the ground that the said action is bad, illegal, contrary to law and without jurisdiction.

53. The petitioner filed his return of income for assessment year 1996-97 on 27/6/1997 declaring total income of Rs.26,61,630/-. The income so returned was accepted by the respondent.

54. Impugned notice dated 28/3/2003 was served on the petitioner on 3/4/2003. The petitioner addressed letter dated 28/4/2003 objecting to the impugned notice on the ground that the same is legally invalid, as the same has been served after expiry of the period of limitation. The petitioner further called upon the respondent to furnish copy of the reasons recorded before issuing notice under Section 148 of the Act. This request was made in light of the decision of Supreme Court in case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and others, (2003) 259 ITR 19. As there was no reply from the respondent the petitioner submitted his return of income on 24/11/2003 declaring the same income as declared in the original return of income without prejudice to his right to challenge the jurisdiction or lack of it on behalf of the respondent. The petitioner also called upon the respondent to supply a copy of the reasons recorded.

55. On 20/2/2004 the respondent issued notice under Section 142(1) of the Act calling upon the petitioner to submit its explanation as regards exemption of the declared amount of Rs.2 crores for the year under consideration under VDIS in view of the conditions prescribed in Section 68(1) of the Finance Act,1997. The petitioner wrote on 24/2/2004 once again requesting to furnish a certified copy of the reasons recorded by the respondent. Once again the respondent issued notice under Sections 142(1) & 143(2) of the Act calling for various information. The petitioner replied on 12/3/2004 and after submitting his explanation he reiterated his request to furnish a copy of the reasons recorded and also requested that the proceedings be dropped as taxing the amount which had already been declared under VDIS would amount to double taxation.

56. As the respondent was not following the procedure as laid down by the Apex Court in case of GKN Driveshafts (India) Ltd. Vs.ITO, (Supra) the petitioner challenged the proceedings by way of petition being SCA No.3312 of 2004. On 16/3/2004 this Court disposed of the petition with the following directions :

> "5. xxx xxx xxx The respondent shall accordingly communicate the reasons for issuance of the aforesaid notice under Section 148 of the Act and after the petitioner submits his preliminary objections to the notice for re-assessment, the respondent shall give the petitioner an opportunity of personal hearing and thereafter shall pass a speaking order deciding the petitioner's preliminary objections against the notice for

re-assessment.

6. This petition is disposed of with a direction to the respondent to act in accordance with the decision of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. Vs. ITO, 259 ITR 19. After the respondent passes a speaking order on the preliminary objections, it will be open to the petitioner to challenge such order".

57. In pursuance of the order of this Court the respondent supplied a copy of the reasons recorded on 18/3/2004 and also called upon the petitioner to make submissions, if any, in addition to the submissions already made.

58. The petitioner raised detailed objections on 22/3/2004. The said objections came to be rejected by deciding the same against the petitioner by order of 26/3/2004 and the said order was accompanied by notice under Section 142(1) of the Act. The present petition has been filed at this stage.

59. The reasons recorded by the respondent read as under :

"Reasons for re-opening income tax assessment in the case of Shri Nitin P.Shah alias Modi for Assessment Year 1996-97.

In this case the assessee declared an amount of Rs.2,00,00,000/ assessment year 1996-97 under the VDIS 1997 along with disclosure of Rs.1,37,00,000/for Assessment Year 1997-98 and other years.

The Assessing Officer observed, while completing assessment for A.Y.1997-98 that the conditions of section 68(1) of VDIS 1997 were not satisfied. According to the A.O. in view of section 68(1) the benefit of the VDIS was not admissible to the assessee. Section 68(1) provides certain mandatory requirement so as to prevent the assessee's income from being included in the total income of the relevant years. His observation as per para 5.1 & 9 of his order are as under :-

Para-5.1 "I have perused the records of the assessee for different years and I find that assessee has neither credited the amount of VDIS for the

year under consideration in the books nor or has he given any intimation of such credit to the Assessing Officer. On 19.3.2002, the assessee was called upon to offer his comments on this issue but the assessee did not offer any comments on this aspect of the matter. Thus, as per Section 68, the Voluntary Disclosed Income will not get immunity from being included in the total income of the concerned Assessment years".

Para-9. "Having accepted this position and also in view of the fact that assessee has not credited the sum in the books and given an intimation to the A.O., the Voluntary Disclosed Income of Rs.1,37,00,000/- for A.Y.1997-98 will have to be included to compute the taxable income of the assessee for the year under consideration ..... Similarly for other years as well remedial action as warranted vide section 68(1) shall have to be taken..."

In view of the above observation of the A.O. that the assessee has not satisfied the conditions required u/s.68(1) of the VDIS 1997 i.e. the assessee has not credited the income disclosed in books of accounts and intimation was not given to the A.O. In view of this the income disclosed in VDIS for A.Y. 1996-97 is includible in total income for the year. Since this income has not been offered for taxation, it has escaped within the meaning of section 147 of the I.T.Act,1961. Since no scrutiny assessment is made for this year and income escaped is more than Rs.1,00,000/assessment can be reopened with the prior approval of the Addl.CIT.

Apart from this while filing the return of income the assessee has stated in a note attached to the return of income "the above statement of computation has been prepared on the basis of receipt and payment account and the Income and Expenditure account drawn up there from. The receipt and payment account has been worked-out on

the basis of details available from the bank account written by the assessee ... ... Any further information which may be gathered by the assessee in due course of time or which may be available to the assessee after filing the return of income, would be brought on record and presented thereafter". These also indicate possible escapement of the income.

In view of the above, I have reasoned to believe that income chargeable to tax has escaped assessment, for which the assessment needs to be reopened".

60. Mr.S.N.Soparkar, learned Senior Advocate appearing on behalf of the petitioner submitted that the reasons recorded by the respondent are based on fresh assessment order dated 28/3/2002 for Assessment Year 1997-98 framed by the respondent in pursuance of original assessment having been set aside by CIT (Appeals). However, the said assessment order could not have formed basis for arriving at a reason to believe that any income has escaped assessment for the year under consideration in light of the fact that the sum of Rs.2 crores was admittedly declared for the assessment year under consideration under VDIS and formed part of total disclosure of Rs.817 lacs. That the Commissioner of Income Tax having issued necessary certificate under Section 68(2) of the Finance Act,1997 regarding the fact of payment of tax on the declared income and thus accepting the declaration it was not open to the respondent to go behind the same and state that conditions of Section 68(1) of the Finance Act,1997 were not satisfied. That even otherwise the appellate authorities had held that it was not open to the respondent to go behind VDIS and he adopted detailed submissions made on merits of the matter in Tax Appeal No. 90 of 2004 for assessment year 1997-98.

61 Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the revenue submitted that the income viz. the amount of Rs.2 crores declared under VDIS for the year under consideration having not been offered for taxation in regular proceedings it could be said that the said income had escaped assessment within meaning of Section 147 of the Act. That over and above the reasons based on the observations of the Assessing Officer for assessment year 1997-98, an additional reason was also assigned; that along with the return of income the note attached by the petitioner itself reflected that there was possible escapement of income as recorded in the reasons. He therefore urged that the respondent authority was

justified in initiating reassessment proceedings by issuing the impugned notice.

62 As can be seen from the reasons recorded the respondent has based his belief on the observations made by the Assessing Officer regarding non crediting of the amounts declared under VDIS while framing assessment for 1997-98. However, even if the said observations could be treated as piece of information, the reasons recorded do not show any such satisfaction having been recorded by the Assessing Officer for the year under consideration. The position in law is well settled that each assessment year is independent and separate from any other assessment year. Therefore before the authority can assume jurisdiction to reopen under Section 147 of the Act it will have to show that it has reason to believe on the basis of independent material relatable to the year under consideration that income chargeable to tax has escaped assessment. Even if for the sake of argument, it can be accepted that for assessment year 1997-98 the petitioner had not intimated the Assessing Officer regarding necessary entries having been made in the Books of Account or in other record, that by itself cannot lead to inference that for the year under consideration no such intimation was given.

63. The latter portion of reasons recorded goes to show that the respondent has no information with him. All that the respondent states is that in light of the note attached to the return of income which is reproduced by him it would also indicate "possible escapement of income". In the circumstances, the impugned notice seeking to reopen cannot be permitted to stand. The reasons recorded must disclose the material and the basis, which reflect the process by which the authority has formed belief. Even if sufficiency of such reasons cannot be gone into, it is equally well established, Court can always examine whether, on such material as disclosed in the reasons, there was a rational nexus for the formation of belief. In other words, whether a reasonable person could have arrived at such a belief. The reasons recorded here fail the objective test. The respondent authority is also not sure that any income has escaped assessment - only a possible escapement of income is indicated. That cannot permit him to assume jurisdiction.

64. On merits of the controversy also, it is necessary to note that in Tax Appeal No.90 of 2004 this Court has accepted the findings recorded by the CIT(Appeals) and the Tribunal that all entries regarding declaration have been incorporated in the Books of Account.

65. In the affidavit-in-reply the respondent has referred to his order dated 26/3/2004 disposing of the preliminary objections raised by the petitioner to reiterate that the issue regarding non-fulfillment of condition under Section 68(1) of the Finance Act,1997 was not adjudicated by the Tribunal and hence it could not be stated that the Tribunal's order covered the grounds of reopening. It is not necessary to deal with the aforesaid averments in detail for the reasons stated in judgment rendered in Tax Appeal No.90 of 2004 as the same would apply for the year under consideration also.

66. Before parting it is necessary to take note of the fact that the petitioner has filed further affidavit dated 14/12/2004 wherein it is stated that while filing the return of income for assessment year 1998-99 viz. the first return filed after making declaration under VDIS, vide Note No.2 to the return of income the petitioner has categorically stated that "

"(2) The assessee has availed the benefits of VDIS SCHEME 1997 and all entries regarding thereto have been incorporated in the books of accounts. The Commissioner has already granted the immunity certificate under that scheme".

This statement remains uncontroverted.

67. Therefore, in light of the aforesaid factual statement also it is not possible to accept the stand of the revenue that the impugned notice seeking to reopen completed assessment for assessment year 1996-97 was validly issued.

68. Accordingly the impugned notice dated 28/3/2003 (Annexure-A) issued under Section 148 of the Act for assessment year 1996-97 is hereby quashed and set aside. The petition is allowed. Rule made absolute.

69. Summary :

(i) In the result, Tax Appeal No. 539 of 2003 filed by the assessee is allowed;

(ii) Tax Appeal No.90 of 2004 filed by the revenue is dismissed;

(iii) Special Civil Application No.3605 of 2004
filed by the assessee is allowed;

(iv) Special Civil Application No. 3960 of 2004
filed by the assessee is allowed.

There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani, J)
m.m.bhatt